

<b>Greco Constr. Dev., Inc. v Bushwack 9, LLC</b>
2017 NY Slip Op 32049(U)
September 28, 2017
Supreme Court, Kings County
Docket Number: 523278/16
Judge: Lawrence S. Knipel
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At an IAS Term, Commercial Part 4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 28<sup>th</sup> day of September, 2017.

**P R E S E N T:**

HON. LAWRENCE KNIPEL,  
Justice.

-----X  
GRECO CONSTRUCTION DEVELOPMENT, INC.,

Plaintiff,

- against -

BUSHWACK 9, LLC,  
ELSEWHERE LLC, and  
"JOHN DOE 1" through "JOHN DOE 10,"  
said parties being lienors who have yet  
to perfect their liens and being fictitious and  
unknown to Plaintiff,

Defendants.

-----X

**DECISION AND ORDER**

Index No. 523278/16

Mot. Seq. No. 1

The following e-filed papers read herein:

NYSCEF Docket No.:

Notice of Motion, Affirmation, Memorandum of Law, and Exhibits Annexed _____	<u>6-13</u>
Affirmation (Affidavit) in Opposition _____	<u>24-25</u>
Reply Affirmation (Affidavit) _____	<u>32</u>

In this action, inter alia, for breach of contract, the preanswer motion of the defendant Elsewhere LLC (hereafter, the defendant) for an order, pursuant to CPLR 3211 (a) (1) and (7),<sup>1</sup> dismissing the complaint of the plaintiff Greco Construction Development, Inc. (hereafter, the plaintiff) insofar as asserted against it is resolved, as follows:

\_\_\_\_\_  
<sup>1</sup>. Although the affidavit in support of the defendant's motion also cites (in ¶ 2) subsection (10) of CPLR 3211 (a) as a basis for dismissal, this provision is not addressed either in the defendant's moving papers or in its supporting memorandum of law and, accordingly, is not considered by the Court.

1. *Dismissal of Certain Causes of Action Without Opposition.* The plaintiff does not oppose the dismissal of the fifth, sixth, seventh, and eighth causes of action against the defendant, and the same are hereby dismissed.

2. *Documentary Evidence (CPLR 3211 [a] [1]).* The documentary evidence submitted by the defendant in support of its motion does not utterly refute the complaint's factual allegations and conclusively establish a defense as a matter of law (*see* CPLR 3211 [a] [1]; *RCI Plumbing Corp. v Turner Towers Tenant Corp.*, \_\_\_ AD3d \_\_\_, 2017 NY Slip Op 05759, at \*1 [2d Dept 2017]). Therefore, the Court need only address the remaining branch of the defendant's motion which is for dismissal of the first, second, third, and fourth causes of action for failure to state a claim under CPLR 3211 (a) (7).

3. *Breach of Contract (First Cause of Action).* "The essential elements for pleading a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of his or her contractual obligations, and damages resulting from the breach" (*Dee v Rakower*, 112 AD3d 204, 208-209 [2d Dept 2013]). The complaint, as augmented by the affidavit of the plaintiff's president, sufficiently pleads a cause of action for breach of contract. The complaint alleges the existence of an agreement between the plaintiff and the defendant, the plaintiff's performance of its obligations under the agreement, the defendant's breach of the agreement, and damages resulting therefrom. Accordingly, the branch of the defendant's motion for dismissal of the plaintiff's first cause of action for breach of contract against it is denied (*see Tri-Star Lighting Corp. v Goldstein*, 151 AD3d 1102, 1105 [2d Dept 2017]; *Webb v Greater New York Auto. Dealers Assn., Inc.*, 123 AD3d 1111, 1112 [2d Dept 2014]).

4. *Unjust Enrichment (Second Cause of Action)*. “The existence of a valid and enforceable *written* contract governing a particular subject matter ordinarily precludes recovery in quasi contract [such as for unjust enrichment] for events arising out of the same subject matter” (*Clark-Fitzpatrick, Inc. v Long Is R. Co.*, 70 NY2d 382, 388 [1987] [emphasis added]). “[S]ince plaintiff is entitled to plead inconsistent causes of action in the alternative, the quasi-contractual claims [for unjust enrichment] are not precluded by the pleading of a cause of action for breach of an *oral* agreement” (*Winick Realty Group LLC v Austin & Assoc.*, 51 AD3d 408, 408 [1<sup>st</sup> Dept 2008] [emphasis added]). Here, the complaint, as amplified by the affidavit of the plaintiff’s president, pleads the existence of a series of agreements between the parties but does *not* allege whether such agreements were written or oral. Reading the complaint in a light most favorable to the plaintiff, the alternative cause of action for unjust enrichment is sustained for pleading purposes. Notably, the defendant, while conceding (in ¶ 15 of its counsel’s reply affirmation) that “there is no dispute as to the existence of agreements between and among the parties,” fails to elaborate whether the parties’ agreement was written or oral. Consequently, the branch of the defendant’s motion for dismissal of the second cause of action for unjust enrichment against it is denied.

5. *Mechanic’s Lien and Trust Assets (Third and Fourth Causes of Action, Respectively)*. Article 3-A of the Lien Law impresses with a trust any funds paid or payable to a contractor “under or in connection with a contract for an improvement of real property”

(Lien Law § 70 [1]). “[T]he Lien Law establishes that designated funds received by owners, contractors and subcontractors in connection with improvements of real property are trust assets and that a trust begins ‘when any asset thereof comes into existence, whether or not there shall be at that time any beneficiary of the trust’” (*Aspro Mechanical Contr., Inc. v Fleet Bank, N.A.*, 1 NY3d 324, 328 [2004] [quoting Lien Law § 70 (3)], *rearg denied* 2 NY3d 760 [2004]). Lien Law § 72 (1) states that “[a]ny transaction by which any trust asset is paid, transferred or applied for any purpose other than a purpose of the trust as stated in [Lien Law § 71] before payment or discharge of all trust claims with respect to the trust, is a diversion of trust assets.”

The complaint alleges that the plaintiff filed a mechanic’s lien against the underlying property for the sum it is owed for the work it performed thereon, that trust assets existed for the benefit of the plaintiff and other contractors, and that the defendant diverted trust assets for purposes other than paying the plaintiff. These allegations are sufficient, at the pleading stage, to state a cause of action for a mechanic’s lien and a diversion of trust assets (*see Lane Constr. Co., Inc. v Chayat*, 117 AD3d 992, 993 [2d Dept 2014]; *Martirano Const. Corp. v Briar Contr. Corp.*, 104 AD2d 1028, 1031 [2d Dept 1984]). The defendant’s unsupported assertion that the improvements to the underlying property were financed by “private means” and that, therefore, no trust assets could have existed under the Lien Law, is insufficient to defeat the plaintiff’s claims at this stage of litigation (*see Carr v Hayes*, 92 AD3d 534, 535 [1<sup>st</sup> Dept 2012], *lv denied* 19 NY3d 802 [2012], *rearg denied* 19 NY3d 951 [2012]).

*Conclusion*

Based on the foregoing and after oral argument, it is

ORDERED that the defendant Elsewhere’s preanswer motion to dismiss the plaintiff’s complaint, pursuant to CPLR 3211 (a) (1) and (7), is granted to the extent that the plaintiff’s fifth, sixth, seventh, and eighth causes of action are dismissed without opposition, and the motion is otherwise denied with respect to the plaintiff’s first, second, third, and fourth causes of action; and it is further

ORDERED that the defendant Elsewhere shall have 20 days from the date of service of this decision and order with notice of entry on its counsel within which to answer the extant portions of the complaint; and it is further

ORDERED that the matter is set for a preliminary conference to be held in Commercial Part 4 on October 20, 2017, at 10 a.m.; and it is further

ORDERED that the plaintiff’s counsel serve a copy of this decision and order with notice of entry on the defendants’ respective counsel and shall file an affidavit of said service with the County Clerk.

This constitutes the decision and order of the Court.

ENTER FORTHWITH,

J. S. C.  
HON. LAWRENCE KNIPEL